No. 11706.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON, HUBERT L. DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction.

This action was commenced by four veterans of the armed forces seeking compensation because of their respective discharges by the appellee Hollywood Baseball Association (respondent below). The appellants (petitioners below) sought to bring themselves within the reemployment provisions of the Selective Training and Service Act of 1940, Section 8, as amended (50 U. S. C. A., App. Sec. 308). The pertinent provisions of the Selective Service Act are:

Section 8(b):

> "In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the

employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year . . .

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . ."

Section 8(c):

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave or absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Subdivision (e) of Section 8 confers jurisdiction upon the district courts of the United States to require employers to comply and to compensate veterans for loss of wages by reason of unlawful action by employers.

Statement of the Case.

Each of the four appellants was under contract as a baseball player to the Hollywood Baseball Association at the time that he entered the military service, and each was honorably discharged from such service and thereafter made application for reemployment with the Hollywood Baseball Association (herein called "the Club"). During the 1946 training period and/or regular season, each of the appellants was signed to a uniform player's contract for the 1946 season and tried out for varying periods of time before being given an unconditional release. The appellant players contend the releases by the Club constituted a violation of the duties imposed upon employers by Section 8 of the Selective Service Act, and they sought compensation for alleged loss of wages and two of them sought orders that the Club restore them to employment.

The respondent baseball club, by its answer, interposed defenses:

1) That the character of the petitioners' (appellants herein) pre-service employment did not come within the provisions of the Selective Service Act for the reason that the employment of each of the petitioners was *temporary* in nature.

2) That the petitioners *had not suffered any loss of wages* because of their discharges by the Club, but that they had earned wages, salary or bonuses during the periods for which they claimed reemployment rights and damages which would not have been earned had they been reemployed by the Club.

3) That the petitioners were *not qualified* to perform the duties of the positions, which they had temporarily held before entry into military service, after return from such service.

4) That at the time of the petitioners' application for reemployment the respondent Club's *circumstances had so changed as to make it unreasonable* to require the restoration of the petitioners to positions of employment.

5) That each of the petitioners was *discharged for cause;* to-wit, inability to play baseball with skill and ability.

6) That each of the petitioners *waited an unreasonable length* of time from the alleged unlawful discharge by respondent in which to commence this action and that the unreasonable delay prejudiced the respondent.

The case was tried on March 6, 1947, before the Honorable Charles C. Cavanah, United States District Judge, sitting without a jury, and on March 25, 1947, the Court made its findings of fact and conclusions of law which specifically found for the appellee, Hollywood Baseball Association, on each of the separate defenses and the decree was entered accordingly. The appellants have appealed from that decree. The "appellants' statement of points on which they intend to rely on the appeal" [R. pp. 159-161] contains a general assignment of error because of refusal of relief and then states that "the pleadings, the evidence and the applicable law are insufficient to, and do not support the trial court's" findings. The basis of the appeal must therefore be found in the alleged insufficiency of the evidence to sustain the findings, which is also set forth as point I of the Specification of Errors in Appellant's brief (Br. p. 37). Apparently the appellant seeks to enlarge the scope of this Court's review, for the

Specification of Errors includes matters not set forth in the Statement of Points on which appellants intended to rely. In any event, it is the belief of the appellee Baseball Club that there was abundant evidence to support the findings of fact, and that the trial Court committed no error in respect to the other matters that appellants have set forth in their brief.

Effect of the Niemiec Case.

Both at the trial and upon this appeal, counsel for the appellants has stressed the case of *Niemiec v. Seattle Rainier Baseball Club* (D. C., Wash., 1946), 67 Fed. Supp. 705, and attempted to show a conflict between that case and the decision in the present case. Without debating the soundness of the *Niemiec* case, it is sufficient to state here that the evidence in the two cases distinguishes them. (*Niemiec* was a first string player and most valuable man on Seattle team prior to military service; the petitioners were rookies being tried out for the Hollywood team.) Both presented questions of fact for decision, and upon easily distinguishable facts different results were quite naturally reached. Appellants have misconstrued the effect of the trial Court's decision in this case by assuming that it held that *all* players under contract with the Hollywood Baseball Association held "temporary" positions, and were therefore excluded from the benefits of the Selective Service Act. Such a broad question was not at issue where the evidence showed that the petitioners were not regular members of the appellee's baseball team. The only point properly before the trial court on this issue, and

the only point decided by it, was that these petitioners, the appellants, held "temporary" positions. Likewise, in respect to the special defense that the employer's circumstances had so changed as to make it unreasonable to restore the petitioners to positions of employment, the findings of the Court cannot be enlarged to apply to all of the persons who might have been in the employ of the Hollywood Baseball Association.

In the *Niemiec* case the Court found that there was no evidence to support a finding that *Niemiec* was not qualified to perform the duties of his position and no evidence to show that his discharge was for cause. In the present case, the evidence was presented to the Court as to the playing ability of each of the petitioners, and upon the basis of that evidence, it was properly found that they had each been discharged for cause.

Questions Involved.

The true question involved in this appeal is the sufficiency of the evidence to support the findings on the different defenses set up by the appellants. Thus, this Court, on appeal, is not concerned with the weight or preponderance of the evidence, which matters are peculiarly within the province of the trial Court; findings made on conflicting evidence are binding and conclusive on the Appellate Court and should not be disturbed unless clearly erroneous. (Federal Rules of Civil Procedure, Rule 52, (a); *Lerner Stores Corp. v. Lerner,* C. C. A. Cal. 1947, 162 F. (2d) 160; *Gates v. General Casualty Co.,* C. C. A. Cal. 1941, 120 F. (2d) 925.)

The Facts.

The pleadings [R. pp. 2 and 7] establish that the Hollywood Baseball Association operates a professional baseball club in the City of Los Angeles, California. Each of the appellants had entered into a written contract with the appellee Club before entering military service. These contracts were on forms known and hereafter referred to as "Uniform Player's Contract." In the case of each player there was a contract prior to military service, and one subsequent to military service—both of which were with the Hollywood Club, and then another contract between the player and the baseball team he played with after leaving the Hollywood Club. The original contracts and other exhibits are on file in the office of the clerk of this Court. However, the parties by stipulation [R. pp. 162-164] have prepared and presented a Table of Contracts, the data from which, when read into the appropriate places in the Uniform Players Contract, printed in full in the Record, pages 35-49 [Pltf. Ex. No. 2], will enable the Court to reconstruct Plaintiff's Exhibits Nos. 1, 3, 5, 8, 9, 10, 11, 13, 14, 15 and 16 without the necessity of referring to the originals filed with the clerk.

The Uniform Players Contract requires the player to render skilled service as a baseball player [R. p. 36, Uniform Contract, Art. 1], for which the club agrees to pay a monthly salary beginning with the commencement of the club's playing season (or such subsequent date as the player's service may commence) and ending with the termination of the Club's scheduled playing season [R. p. 37, Uniform Contract, Art. 2].

Article 5(b) of the Uniform Player's Contract provides [R. p. 40]:

> "5(b) Termination
>
> This contract may be terminated at any time by the Club or by any assignee by giving official release notice to the player."

The contracts also provide that a player may not play baseball otherwise than for the contracting club or its assignee except in conformity with certain rules and that he will not play in any such baseball games after October 31st of any year until the following spring training season [R. p. 39, Contract, Art. 4(b)]. The purpose of these contracts and the National Association Agreement and the Major-Minor League Agreement and Rules is:

> "to insure to the public wholesome and high-class professional baseball by defining the relations between club and player, between club and club, between league and league . . ." [R. p. 36, Contract, recital.]

The fact that the Great American Pastime is a competitive sport is a matter of common knowledge, and it is almost equally well known that the different teams or clubs are eternally seeking new and better players so as to provide the public with the best possible entertainment. A considerable group of baseball "scouts," experts in their trade, conduct a constant search for new talent—directed primarily towards young ball players. As a consequence, large numbers of individuals are "signed" to baseball contracts; in fact, many more are signed than a professional club is allowed to retain under contract. [R. pp. 102-103]. The general purpose of hiring the additional players is for the development of young ball players

and to give them an opportunity to play professional baseball; and, if they don't make the ball club they have signed with, they are sent out for additional experience to the various leagues of lower classification or released [R. pp. 103-104]. Some of the prospects are "farmed out" with the hope that they will develop their ability and skill as baseball players. The tenure of employment of each player is not dependent on seniority, but is dependent upon the professional skill of the individual in a highly competitive sport [R. p. 105]. In entering into contracts with ball players the different baseball clubs, and the players as well, are mindful that the contracts are terminable at the will of the club and as a consequence the clubs take on many more players than are needed [R. pp. 103-104].

Each of the appellants was employed *strictly as an inexperienced prospect during the period before his entry into military service, and none of them was a regular team player on the Hollywood Baseball Club* [R. pp. 106-107, testimony of Oscar Reichow, Business Manager of the Hollywood Club].

The facts in the case of each appellant are:

William Barisoff.

William Barisoff, 25 years of age, began playing professional baseball in 1940, at the age of 18. In that year, he was put under contract by appellee Hollywood Baseball Association at $150.00 per month, and optioned to the Salinas (Kansas) Club in a Class C league [R. pp. 30, 31, 57]. Hollywood renewed his contract in 1941 and farmed him out, first to San Bernardino, another Class C Club; and then to Santa Barbara, a team of like class [R. pp. 31, 57]. His contract was again renewed by Hollywood in 1942 and he was farmed out to the An-

niston (Ala.) Club in the Southeastern League (Class B), where he played a month and was then called back to Hollywood. He was a regular on the teams of the clubs to which he had been optioned or farmed out, and played in a large number of their games.

After being recalled to Hollywood he did not play many games, and was then farmed out to Fort Worth for the balance of the 1942 season, which he completed there.

In November, 1942, he was inducted into the Navy after the close of the baseball season. He was then still under contract to Hollywood at a salary of $200 per month [Pet. Ex. No. 1, R. pp. 33, 163].

He was honorably discharged December 7, 1945, and in the same month applied to Hollywood for reemployment.

On February 18, 1946, Hollywood placed him under contract for 1946 at $300.00 per month [R. pp. 34, 35, 50; Pltf. Ex. No. 2, R. pp. 35-49]. He reported for spring training with the Hollywood team at Ontario, Calif., for about six weeks.

During this spring training period, the field manager of the Hollywood Club, Robert S. Fausett, a man of eighteen years' experience in professional baseball, including the management of four different clubs [R. p. 131], observed Barisoff's play. As a manager, one of Fausett's duties was to select and evaluate ball players [R. p. 132]. Upon sufficient observation to form a judgment as to Barisoff's ability to play baseball, Fausett testified that Barisoff did not have a sufficient degree of professional skill and ability to meet the standards of the Hollywood Baseball Club [R. p. 133]. Barisoff had been given an opportunity and chance to demonstrate his ability in exhibition games [R. pp. 137, 139].

Hollis John Thurston, scout and coach for the Hollywood Club, with thirty-two years professional baseball experience including nine and a half years in the major leagues also testified with respect to each of the appellants [R. p. 145, *et seq.*]. As a scout his duty was to make recommendations on the ability of baseball players. During the 1946 training season, he observed Barisoff sufficiently to form an opinion as to his ability, and that opinion was that Barisoff was a pitcher who couldn't throw very well.

Accordingly, Barisoff was released on March 26, 1946, and paid $150.00 by the Hollywood Club.

On April 24, 1946, Barisoff was put under contract by Bremerton, a Class B club, at $175.00 per month, with a provision that he would receive 10% of the sale price of his contract, if sold [Pet. Ex. No. 3, R. pp. 53 and 163].

After the close of the season, on September 8, 1946, Bremerton optioned Barisoff to the New York Giants, a major league baseball club, for $12,000.00; $4,000.00 down and the remaining $8,000.00 to be paid on taking up the option, after a 30-day test with the Minneapolis Club [R. pp. 56, 58]. Barisoff received $400.00 as his 10% on the $4,000.00 paid by the New York Giants, under the above "bonus" clause of his Bremerton contract.

On this testimony the Court found that Barisoff was not qualified and that he received $1,325.00 in wages, salaries and bonuses during the 1946 season which he would not have earned had he been reemployed by the Hollywood Club [R. p. 18].

ARTHUR M. LILLY.

Arthur M. Lilly was put under contract by Hollywood in 1942 and optioned to Tacoma, in the Western International League (Class B) [R. pp. 59-62].

During the 1943 season he was put under contract by Hollywood, at a salary of $300.00 per month and played as a "utility" man [R. p. 107].

Lilly was honorably discharged from the Army on January 9, 1946, and on February 18, 1946, he signed a contract with Hollywood at $450.00 per month. He attended 1946 spring training.

Manager Fausett and Scout Thurston each observed Lilly during spring training and until he was released on May 26, 1946, and each was of the opinion that Lilly was not equal in ability to the standard of play in the Pacific Coast League [R. pp. 133, 150]. Coach Thurston worked particularly with Lilly in an attempt to improve his batting, but was unable to bring him up to the standard of the ball club [R. pp. 79, 150].

On June 7, 1946, Lilly was employed by the Yakima Club (Class B) at a salary of $200 per month with a $500.00 "bonus for signing." This contract was on the Uniform Player's Contract Form.

After his discharge on May 26, 1946, Lilly earned $660.00 salary from Yakima (June 7-Sept. 8 at $200.00 per month), and $1,800.00 from Hermosillo, Mexico, from October 16, 1946, to February 18, 1947 [R. pp. 78-79].

The Court therefore found that Lilly was not qualified and that he received $885.00 from Hollywood, $1,160.00 from Yakima and $1,800.00 from Hermosillo, or a total of $3,855.00, in wages, salaries and bonuses which he would not have earned had he been reemployed by the Hollywood Club [R. p. 18].

Hubert L. Dawson.

Hubert L. Dawson was put under contract by Hollywood in 1943, at $300.00 per month, *and was used about five times as a pinch hitter on the Hollywood active team,* until he was optioned to the Memphis, Tenn., Club (Class A-1). He played on the Memphis team until he entered the service on June 24, 1943 [R. pp. 91-94, 163; Ex. 14].

He was placed on terminal leave April 6, 1946, and was honorably discharged April 20, 1946.

On April 1, 1946, he applied for reemployment, and signed a contract with Hollywood to play baseball at $375.00 per month in 1946. He was released on April 14, 1946 [R. pp. 95-96]. On April 24, 1946, he signed with Yakima at $200.00 per month and a bonus of $450.00.

Both Manager Fausett and Coach Thurston testified that Dawson did not have a degree of professional skill and ability sufficient to equal the standards of the Hollywood Baseball Club [R. pp. 133, 150]. The Court found that he was not qualified and that he had earned $1,583.50 during the 1946 season.

ROBERT I. KNUDSON.

Robert I. Knudson, 21 years of age, began playing professional baseball with Hollywood in 1943, when he was 18 years old. In that year, he was a pitcher on a high school team, until the close of school in June; and was then put under contract by Hollywood at $200.00 per month, as a "rookie" pitcher from June until the end of the season 1943. He played only as a "relief" pitcher and won no games.

In February, 1944, he entered upon active duty in the Army, and was honorably discharged May 5, 1946, after the start of the Hollywood playing season.

He applied for reemployment and on May 29, 1946, was put under contract by Hollywood at $250.00 per month, and was immediately optioned to Fresno (Class C), after having worked out with the Hollywood team [R. p. 132].

Knudson was released on July 29, 1946, by the Hollywood Club [R. p. 83] and on August 15, 1946, he signed with the Fresno team at a salary of $200.00 per month [R. p. 86]. The Court found that he was not qualified and was discharged for cause on the basis of testimony by Manager Fausett and Coach Thurston that Knudson did not have the skill or ability to play ball up to the standard of the Hollywood Team [R. pp. 133, 149-150]. The Court also found that he earned $706.61 from the time he returned from military service (Knudson did not rejoin the Club until May 29, 1946, when the season was under way) [R. p. 82].

ARGUMENT.

I.

Each of the Appellant's Held Only a "Temporary Position," as a Rookie Baseball Player, and Did Not Come Within the Reemployment Provisions of the Selective Service Act.

The rights, if any, of the petitioners in this case are based entirely on Section 8 of the Selective Service Act which is quoted in the portion of this brief discussing the Court's jurisdiction. Therefore, before these petitioners are entitled to claim the benefits of this statute, they must come within its language, *i. e.,* they must have held *"a position other than a temporary position."*

In *Bryan v. Griffin,* 67 Fed. Supp. 714, it was held that the term "temporary position" should be interpreted according to common usage. The appellee, Hollywood Baseball Association, is fully aware that by this section of the Selective Service Act Congress sought to assist those who served our country in its time of great need; that the act required reemployment of veterans whose employment had been "at will" or was "seasonal." However, it is equally clear from the language of the Act, as well as the decisions applying it, that Congress did not extend the reemployment benefits to every employee irrespective of the nature of his position. *Fishgold v. Sullivan Drydock,* 328 U. S. 275, 90 Law Ed. 961, 66 S. Ct. 1105. In many instances the courts have found that particular veterans held only "temporary" positions. *Fraser v. Shoberg,* 65 Fed. Supp. 83 (a secretary-treasurer of a union who had been elected for a year's term held to have a *temporary position*). *Gualtierri v. Sperry Gyroscope Co.,* 67 Fed. Supp. 219; *Salzman v. London Coat of Boston,* 156 F. (2d) 538, cert. den. 67 S. Ct. 501 (temporary pending return

of another man from military service). The case of *McCarthy v. M. & M. Transp. Co.*, C. C. A. 1947, 160 F. (2d) 322, held that a veteran, to compel his reemployment, must prove that he left a position which was permanent in its nature. The burden of sustaining his case is upon the petitioning veteran.

The precedents can only serve as a guide in determining the true nature or character of these appellants' pre-service employment; the trial Court very properly looked to the circumstances surrounding the ball players' positions and then found the fact to be that the positions were temporary. In this connection, Mr. Oscar Reichow, a man of thirty-eight years' experience in professional baseball, explained the relationship between the appellants and the Hollywood Club [R. pp. 101-107]. Reichow's testimony was to the effect that baseball clubs hire many players in their search for a winning team.

The rules of the various leagues limit the number of players that can be under contract to a particular club at a particular time. Untested and unproven players are taken from high school, college, and semi-pro teams and signed to contracts to give them experience and training under professional supervision. The tenure of employment of each such prospect is in no way dependent on seniority; it is strictly a matter of professional skill in a highly competitive field. Those who are gifted to go on to large financial success while others attain more moderate success, and many fall by the way. There are even varying degrees amongst those who fall by the wayside, so that some last only a few weeks and others last a few seasons. With specific attention to the players involved in this case, it is to be noted that they were all inexperienced prospects in a developmental stage [R. pp. 106-107]. None had reached the status of a regular; for

each the Hollywood Club had hopes that he would, with experience, improve sufficiently to make its team. In reliance upon the termination provision of the Uniform Player's Contract the Hollywood Club signed large numbers of players in its process of searching for good players. This situation points to a clear-cut distinction between the facts of the present case and those of *Niemiec v. Seattle-Rainier Baseball Club,* 67 Fed. Supp. 705. *Niemiec* had been the outstanding second baseman of the Pacific Coast League during the season before entering military service; just before he was discharged by the Seattle Club its manager and vice-president gave *Niemiec* a letter extolling his baseball ability, and declaring that he had been a star on the team for the three years preceding his service and during which Seattle won the championship each year.

Appellants cite (App. Br. p. 42) an opinion of the attorney-general intended to assist in determining what is the meaning of the statutory language "other than a temporary position." That opinion requires examination of the contract and the conditions and character of the employment. The contracts here involved expressly provided that the employment of each appellant might be terminated at will and it was clearly and mutually understood between the players and the employer that their tenure was dependent upon showing progress and improvement in the art of playing baseball. Judge Cavanah correctly found that the petitioners held temporary positions and were not included within the reemployment provisions of the Selective Service Act [R. pp. 20-22].

II.

The Petitioners Did Not Suffer Any Loss of Wages Because of Their Discharges by the Hollywood Club.

The record shows that each of the players entered into a new contract for his services after being released by Hollywood. In the cases of Lilly and Dawson, cash bonuses in the respective amounts of $500.00 and $450.00 were received from the new employer and in the case of Barisoff a $400.00 cash bonus was received at the end of the season. (The details on these payments and references to Record are enumerated in the Statement of Facts, *supra.*)

The Uniform Player's Contract provided that the employee would be paid only during such portion of the regular playing season as he was employed [R. p. 37, Contract Art. 2], and that the employee would not play in post-season games [R. p. 39, Contract Art. 4(b)]. During the 1946-47 contract year, player Lilly earned $1,800.00 by playing for the Hermosillo team. Upon the testimony of the petitioners themselves as to their baseball earnings during the 1946-47 year, the trial Court found [R. p. 18] that the players had earned wages and/or salaries and/or bonuses which they would not have earned if they remained in the employ of the Hollywood Club. These figures were:

For Petitioner Barisoff	$1,325.00
For Petitioner Dawson	$1,583.50
For Petitioner Knudson	$ 706.61
For Petitioner Lilly	$3,855.00

The Selective Service Act entitles a veteran to a year's compensation; it does not establish a penalty against an employer. If then, the veteran procures other work after an improper discharge or refusal to re-employ, the wages thus received must be set off against any claim of compensation. *Hoyer v. United Dressed Beef Co.*, D.C. 1946, 67 Fed. Supp. 730, 734. Assuming that these petitioners did come within the reemployment provisions of Selective Service, Barisoff would have earned $1,200.00 (6 months at $200.00 per month), Dawson $1,800.00 (6 months at $300.00 per month), Knudson $753.18 (6-6-46 to 9-29-46 at $200.00 per month) and Lilly $1,800.00 (6 months at $300.00 per month) from the Hollywood Club. Both Barisoff's ($1,325.00) and Lilly's ($3,855.00) actual earnings exceeded their prospective compensation from Hollywood and they are in no event damaged. Knudson's actual earnings ($706.61) fell only $46.57 below his prospective compensation from Hollywood and Dawson's actual earnings ($1,583.00) resulted in a loss to him of $216.50.

This analysis is founded upon a consideration of the players' salary terms at the time of entry into service. Appellants argue that they are entitled to increases in salaries as shown by their post-war contracts. In this argument they blow hot and cold as they seek the benefit of the voluntary increases established by the contracts—but deny the effect of the termination clause contained in the same contracts. Upon uncontradicted evidence the Court found that the increased wages were based upon the right and privilege of the baseball club to terminate each reemployment contract [R. pp. 108, 20].

III.

The Petitioners Were Not Qualified to Perform the Duties of the Positions, Which They Held Temporarily Before Entry into Military Service, After Return From Such Service.

One seeking to obtain reemployment benefits under the Selective Service Act must be "qualified to perform the duties of such position." (Section 8(b) of Selective Training and Service Act of 1940, as amended.) The question of whether or not each of these veterans was so qualified presented an issue of fact for the trial Court. *McClayton v. Cassell Co.,* D. C. 1946, 66 Fed. Supp. 165; *Trusteed Funds v. Dacey,* 160 F. (2d) 413, 420. The trial Court found specifically that each of the players was not so qualified at the time he sought reemployment [R. p. 22]. It is interesting to note that there is a paucity of testimony in favor of any qualifications by appellants, while the testimony on behalf of appellee that the players were not qualified is clear and positive [R. pp. 132-134, 146-151]. The trial Court, upon the consideration of the expert testimony of appellants' witnesses found that the veterans were not qualified. Counsel for appellants attempts to minimize the effect of such testimony by describing it as naked opinion unsupported by factual testimony; but it is submitted that the testimony offered was proper and of great probative value. Admittedly the Hollywood Baseball Club could not arbitrarily reach a decision that individual players were "not qualified" and thus bar them from reemployment rights. What it could do and did do was to obtain the impartial opinion of men

experienced in judging the qualifications of baseball players. These experts observed each of the players for a sufficient time to form an opinion as to their respective ability and qualifications, and this evidence was persuasive to the trial Court. Appellants make much of the failure of the expert witnesses to describe or define a "standard of play" with a mathematical nicety. If such a precise formula for judging baseball ability could be found, the finder would have something not yet known to the baseball world. Both Manager Fausett and Scout Thurston testified to the unreliability of statistics and to the need to depend on the intuition of experience in judging ball players. At most, the matters of statistics would go to the weight of the testimony offered.

A further contention is made to the effect that by signing the players to post-service contracts the Hollywood Club was estopped to deny that they were qualified. The doctrine of estoppel is not applicable in this situation because the signing of contracts in no way prejudiced the veterans. Furthermore the doctrine of estoppel may not be used as a sword to place the Hollywood Club in an unescapable dilemma; that is, to be charged with not testing the players' qualifications or be charged with having waived any shortcomings because of giving the opportunity to the players to show their ability. *Bryan v. Griffin,* 67 Fed. Supp. 714, 718. The matter of estoppel was not raised by the pleadings, at the trial, nor was it mentioned in "Appellants' Statement of Points on Which They Intend to Rely on Appeal" [R. pp. 159-161].

IV.

The Hollywood Baseball Association's Circumstances Had So Changed as to Make It Unreasonable to Restore Appellants to Positions of Employment.

In its Opinion the trial Court laid special emphasis upon the change in circumstances experienced by the Hollywood Club between the time appellants left for military service and when they sought reemployment. Judge Cavanah said:

> "The evidence is undisputed that a higher and greater class and standard of qualifications for players in the Pacific Coast League had developed while the petitioners were not playing . . . and the statute authorized the respondent to refuse to reemploy the petitioners at the time in question." [R. p. 15.]

Selective Service Act 50 U. S. C. A., App. 308(b)(3)(B) provides:

> "If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay *unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;* . . ." (Italics added.)

There were two changes in the circumstances of the Hollywood Club which made it impossible and unreasonable to reemploy the appellants. *First,* during 1945 and while these veterans were in military service a change was made in the classification of the Pacific Coast League

raising it from an AA league to an AAA league. In such a higher classification a better and higher standard of baseball is played, higher salaries are paid and better ball players are used [R. p. 114]. It is a matter of common knowledge that for many years the Pacific Coast League has been striving for "Major League" status; the up-grading in classification in 1945 was one step in this transition. *Second* the national baseball rules limit the number of men which each team may have under contract at one time. During the war and at the time each of these players entered military service a team could have 30 players on its active list and 12 in reserve or a total of 42 ball players under contract. But at the time these appellants sought reemployment the national baseball rules limited each ball club to 25 players on its active list and 12 in reserve or a total of 37 players [R. pp. 116-119].

Both of these facts were of great importance to the Hollywood Club. Because of the improvement in the league's standard of play and the reduction in the number of players allowed, the pressure to select good players and to eliminate poor ones was intensified. It would have been considerably more than an "inconvenience" to require the Hollywood Club to rehire men who would have been "impossible or unreasonable," and thus within the exception set forth in the Selective Service Act.

V.

Each of the Petitioners Was Discharged for Cause; To-Wit, Inability to Play Baseball With Skill and Ability.

The matter of discharge for cause is closely connected with the determination of the veterans' qualifications to perform the duties of their positions. Again assuming, for the sake of argument, that the reemployment provisions of the Selective Service Act applied to these appellants, the statute also permitted a discharge for cause (Sec. 8(c)). *Basham v. Virginia Brewing,* D. C. 1946, 66 Fed. Supp. 718. Whether or not cause for discharge actually existed presented an issue of fact, and the Court found that each of the players lacked the skill and ability to perform the duties of his position [R. p. 23]. *Hoyer v. United Dressed Beef,* 67 Fed. Supp. 730, 732. A baseball player is a professional artist and the contracts under which these and all other professional baseball players are employed provide that "The Club hereby employs the Player to render skilled service as a baseball player" [R. p. 36, Contract, Art. 1].

Appellants' own appraisal of their ability is that they were "mediocre" players (App. Br. p. 47). On the other hand, the expert testimony was unanimous in the opinion that none of these players had the professional skill and ability to meet the standards of the Hollywood Baseball Club [R. pp. 132-134, 149-151]. While the expert witnesses testified that each had sufficient observation of the various players in training and practice games, the trial judge made close inquiry to satisfy himself that the manager and coach had rendered an honest and impartial judgment on the players' abilities [R. p. 139]. The finding of the trial Court after due and deliberate consideration of the testimony should not be disturbed on appeal.

VI.

Each of the Petitioners Waited an Unreasonable Length of Time From the Alleged Unlawful Discharge by Respondent in Which to Commence This Action and the Unreasonable Delay Prejudiced the Respondent.

The players were given releases by the Hollywood Club on the following dates: Barisoff, April 1, 1946; Dawson, April 15, 1946; Lilly, May 26, 1946, and Knudson, July 29, 1946 [R. p. 19]. The action was filed in the United States District Court on January 23, 1947, or 9 months and 23 days after Barisoff's release, 9 months and 8 days after Dawson's release, 7 months and 27 days after Lilly's release, and 5 months and 24 days after Knudson's release. Congress provided that cases involving reemployment rights under the Selective Service Act should be given priority of hearing. 50 U. S. C. A. App. 308(3). In the case of *Dacey v. Bethlehem Steel Co.*, D. C. 1946, 66 Fed. Supp. 161, it was held that a veteran had delayed an unreasonable length of time in enforcing his demands. The delay in the *Dacey* case was from October 1944 to July 1945—a period of nine months.

All of the players except Knudson were discharged at the beginning of the baseball season, but did not attempt to enforce their claims until long after the 1946 season ended. This delay on the part of petitioners did substantial prejudice to the respondent baseball club. In effect these appellants are attempting to get two years privileges under the Selective Service and Training Act instead of the one provided for in the statute. If the men had

brought an action and been restored to the ball club, they would have received their pay; since it was only a six months season that they would be entitled to be restored to, the obligations of the employer would then have been fulfilled. Now, two of the players, Dawson and Lilly, are seeking to be restored to their positions; and, in effect they are making it a two-year statute instead of the one-year statute which it is. That certainly is to the detriment of the Hollywood Baseball Club.

The trial Court found that each of the petitioners waited an unreasonable length of time from alleged unlawful discharge by the Hollywood Baseball Club in which to commence this action, and that the unreasonable length of time in seeking to enforce his demands has prejudiced the respondent [R. p. 23].

Conclusion.

Appellants' hope for relief is summarized on page 60 of their brief where it is stated, "The Act covers all employers, and exempts none." Such a broad statement is likely to lead to a misunderstanding of the limitations which are contained in the reemployment sections of the Selective Service Act. Actually, there are limitations based on fairness and practicality, and these limitations are expressly set forth in the statute. Appellee is not attempting to read implied exceptions into the word of Congress. Instead a dispute arose as to the factual circumstances surrounding the relationship between these appellants and the appellee. The issues were tried and decided in favor of the appellee and the findings establish

that the character of appellants' employment did not come within the language or intent of the Selective Service Act. Furthermore, it was found that the players suffered no loss of wages, were not qualified to perform the duties of their positions, were discharged for cause, and waited an unreasonable length of time before commencing this action, and that the circumstances of appellee had so changed as to make it unreasonable to require the restoration of appellants. Any one of the above findings would have required a decree for the respondent, and there is no ground for disturbing the decree entered by the trial Court.

Respectfully submitted,

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